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In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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OPINION BELOW

The opinion of the Court of Appeals (R. 5495–5502) is reported at 233 F. 2d 649.

JURISDICTION

The judgment of the Court of Appeals (R. 5503) was entered on May 3, 1956. The time for filing a petition for writ of certiorari was extended by Mr. Justice Reed on July 21, 1956, to September 29, 1956 (R. 5503–5504). The petition for certiorari was filed on September 28, 1956, and was granted on December 17, 1956 (R. 5504). 352 U. S. 950. The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Under Section 2 (b) of the Clayton Act, a seller may defend against a charge of illegal price discrimination by showing that "his lower price" was granted in "good faith" to meet an equally low price of a competitor. The question presented is whether a discount regularly granted to certain large customers pursuant to the seller's long established and inherently discriminatory pricing policy can be justified under Section 2 (b) (*i. e.*, as a "good faith" meeting of competition) on the ground that some of the seller's major competitors employ the same pricing policy.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

* * * * *

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to

injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *

* * * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

* * * * *

STATEMENT

PRIOR PROCEEDINGS

The complaint issued by the Federal Trade Commission in this case (R. 2–5) charged the respondent Standard Oil Company with price discrimination in the sale of gasoline in the Detroit metropolitan area in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. 13. It was alleged that Standard, since the date of the Robinson-Patman Act, had regularly sold at the

"tank-car" price to four large reseller accounts (each of which made substantial retail sales)[1] while selling at the higher "tank-wagon" price to numerous other reseller accounts (358 retail service stations) in the same area.[2] It was also alleged that the effect of the discrimination had been, and "may be," to injure, destroy, or prevent competition between the two classes of resellers in selling directly to the consuming public (R. 3).

Standard's answer (R. 5–28) admitted the existence of the price differential (R. 5, 11–12) and the competitive relationship between the two classes of resellers (R. 9), but sought to justify the differential on three main grounds: (1) that the function performed by the four large resellers—called "jobber" accounts by Standard—was essentially different from that performed by the other resellers (R. 12–15); (2) that the differential was justified on the basis of costs (R. 15–17); and finally (3) that the lower price accorded the "jobber" resellers was granted in good faith to meet or partially meet the equally low or lower prices of competitors (R. 17–22).

---

[1] The four are: Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., Wayne Oil Company, and Ned's Auto Supply Company.

[2] Of these 358 retail service stations, approximately 60% are lessees of Standard under leases usually for one year (CX 1A to 1I; R. 101, 4702–4712; R. 107), which require that the lessees purchase their gasoline from Standard at the tank-wagon price (R. 2092, 2123–2124). Other service station operators purchasing gasoline from Standard are required by contracts to purchase all of their gasoline requirements from Standard at the tank-wagon price (CX 2, R. 106, 4713). All sales by Standard to service station customers in Detroit since 1936 have been under one of these leases or contracts (R. 210). See *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, 235 n. 3.

In its answer, Standard described in some detail "its general policy and practice of bona fide selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail sellers" (R. 13). Standard stated that "such system and practice of selection and classification of customers" was an integral part of the oil industry in Detroit (R. 13); that "* * * differences in prices of the same commodities are made to customers selected and falling within different classifications, and purchasers falling within the classification of wholesalers or jobbers of gasoline are entitled to purchase at tank-car prices as distinguished from dealer tank wagon prices at which gasoline is sold to retail resellers" (R. 13); that Standard employed fixed criteria for making this classification (R. 13–14); and that the four resellers receiving Standard's tank-car price met these criteria (R. 14). The principal requirements for "jobber" status under this "system and practice" were stated to be: a large volume of distribution (usually one or two million gallons annually), a bulk plant capable of accepting deliveries in tank-car quantities, means of making deliveries from the bulk plant, and an adequate credit rating (R. 13–14, 5388).

In the course of the hearings, Standard introduced evidence showing that "jobber" status and the tank-car price were first accorded to Citrin-Kolb in 1928 or 1929 (R. 1257); to Stikeman Oil Company about 1932 (RX 37–C, R. 1587, 4862; R. 5060); to Wayne Oil Company in 1935 (R. 379); and to Ned's Auto Supply Company in 1938 (R. 1895). Standard's witnesses

testified that it had its own specific requirements for "jobber" status (R. 1890–1895); that the four large reseller accounts involved here met those requirements (R. 1895); that it did not accord "jobber" status to any reseller that did not meet those requirements (R. 172–174, 2084–2088, 2124); that it would rather lose "jobber" accounts than depart from those requirements (R. 1912, 1916); that it had but two prices for reseller accounts—the tank-car price for "jobber" accounts and the tank-wagon price for ordinary resellers (R. 167–169, 1899). According to Standard's witnesses, this method of pricing was used not only in Detroit (R. 1890, 1897, 2065) but elsewhere in the country (R. 943, 1060, 1064, 1075, 1890), and not only by Standard but by some of its major competitors, including Texas, Gulf, and Shell (R. 319–320, 941, 1072, 1897).[3] Standard also introduced evidence to show that, during the period involved, it departed from its dual pricing method in only one instance; its officials referred to this as an "exception" (R. 167–169).[4]

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[3] While some major oil companies sell and distribute in the Detroit area in a manner similar to the system employed by Standard, its two largest competitors in that area, Socony-Vacuum and Sun Oil Company, sell only at the tank-wagon price (R. 320, 2128–2130).

[4] The one exception is Standard's grant to Ned's on September 1, 1936, of a price one-half cent below the tank-wagon price. This arrangement continued until March 7, 1938, when Ned's, having acquired tank-car storage facilities, was designated a "jobber" by Standard and was granted the tank-car price (approximately 1½¢ below the tank-wagon price). (R. 5383.)

At the conclusion of the hearings, the Commission found *inter alia* that Standard's classification of these four reseller customers as "jobbers" was arbitrary (R. 5168);[5] that the four so-called "jobbers" were actually in competition with Standard's other reseller customers not so classified (R. 5165); that the differential in price accorded the two classes of accounts resulted in competitive injury (R. 5170–5171); and that the differential was not justified on the basis of costs (R. 5171–5178). Thereupon, the Commission issued an order to cease and desist (R. 5183–5185).

Although Standard had introduced evidence designed to show that its tank-car price had been granted in good faith to meet or partially meet the equally low or lower price of competitors, the Commission was of the view that, as a matter of law, the Section 2 (b) defense was not available to a seller "in the face of affirmative proof that the effect of the discrimination was to injure, destroy and prevent competition." Accordingly, no findings were made on the issue (R. 5179).

On petition for review in the Court of Appeals for the Seventh Circuit (R. 5270–5279), Standard contended that the Commission had erred in its ruling as to the availability of the Section 2 (b) defense. The Court of Appeals approved the Commission's findings and conclusion, and with but slight modification

[5] The Commission found that Citrin-Kolb, Wayne, and Stikeman sold a substantial portion of Standard's gasoline directly to the consuming public, and that Ned's Auto Supply Company sold all of the gasoline directly to the public (R. 5369–5371).

affirmed the Commission's order to cease and desist (173 F. 2d 210).

However, this Court held that Section 2 (b) did provide a complete defense to a charge of price discrimination, reversed the judgment of the Court of Appeals, and remanded the case to the Commission to make findings as to whether or not Standard's lower prices were made in good faith to meet the equally low prices of competitors (340 U. S. at 238, 251).

THE COMMISSION'S FINDINGS ON REMAND

On review of the evidence, the Commission concluded that Standard had failed to sustain its burden of proving that its lower price was accorded in "good faith" to meet the equally low price of a competitor. (R. 5390).

The Commission found that Standard's "method of pricing its gasoline in the Detroit metropolitan area is to sell to its customers generally at what is designated in the oil industry as the 'tank-wagon price' and to sell to a much more limited number of purchasers at a 'tank-car price', the latter being 1½ cents per gallon lower than the former" (R. 5383). It found that under this method of pricing, which was established prior to the passage of the Robinson-Patman Act, the determination of whether or not the tank-car price should be accorded to a particular customer took no account of the distributive function performed by the purchaser (R. 5388). Instead, "[i]n selecting the customers or prospective customers to whom it will

grant the tank-car price on gasoline, the respondent's criterion is now, and for many years has been, that the customer or prospective customer make annual purchases of not less than from one to two million gallons of gasoline, have storage facilities sufficient to accept delivery in tank-car quantities, and have a credit standing assuring payment for large volume purchases. This is the same criterion which for many years has also been applied by the respondent's major competitors * * *" (R. 5388). Standard's four "jobber" accounts, "except Ned's Auto Supply Company, had already been recognized as entitled to the tank-car price under the commonly accepted standards of the industry, and Ned's had achieved a volume of distribution which brought it within the range where it was likely to be so recognized by a major oil company at any time" (R. 5388). On the basis of the latter finding, the Commission acknowledged that "[i]t may well be [Standard] was convinced * * * it would lose these accounts" if they were not accorded the tank-car price and that Standard "had substantial reasons for believing this to be the case" (R. 5388).

"Thus," the Commission stated (R. 5388), "the real question is whether or not the actions of [Standard] in granting or continuing to these four dealers the tank-car price pursuant to and in accordance with its general policy can be said to have been made in good faith within the meaning of Section 2 (b)."

In deciding this question, the Commission found that there was no evidence that the tank-car price was granted to any of the four "jobber" accounts in re-

sponse to any specific competitive offer (R. 5387–5388).[6] Instead, with one exception, "all of the discriminations in price involved in this proceeding were made pursuant to respondent's established method of pricing. They were not the result of departures from a non-discriminatory price scale which were made to meet lower prices of competitors, but represented only the continued application of the pricing standard previously adopted by respondent and followed by it since long before 1936" (R. 5389).

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[6] Standard had introduced evidence of offers made by competitors to its four "jobber" accounts. The Commission made detailed findings as to these offers (R. 5383–5388):

The six offers made to Citrin-Kolb were made subsequent to the time Standard accorded "jobber" status to that reseller in 1928 or 1929. The Commission found that, although these offers were communicated to Standard, Standard in fact never responded thereto and never receded from its policy and requirements (R. 1287, 1291, 1301).

Any specific offers made to either Wayne or Stikeman were made either before the passage of the Robinson-Patman Act or after issuance of the complaint in this proceeding. The record contains no evidence that Standard's price to these "jobbers" was granted pursuant to such offers.

Standard accorded "jobber" status to Ned's in March 1938 (R. 1895). The record shows that, prior to 1936, four specific offers were made to Ned's, none of which was accepted (R. 1803–1804, 1806–1809, 1810–1811, 1866). Subsequent thereto, at the time Ned's was accorded the tank-car price and "jobber" status, the only subsisting offer open was that of the Red Indian Oil Company on a gasoline which was not a major brand (R. 3098). The Commission found that this offer did not represent a serious competitive threat to Standard (R. 327, 5387) and that Standard in fact did not meet this particular offer when it accorded the tank-car price to Ned's, but instead granted the lower price on the understanding that Ned's would conform to Standard's requirements for "jobber" status (R. 1821, 1995), the volume requirement having already been satisfied (R. 119, 5372).

[7] See note 4, *supra*.

In addition, the Commission found that Standard, by reason of its long familiarity with every phase of the refining and distribution of gasoline, knew or should have known that its pricing method would probably have the effect of injuring competition among its customers, and knew or should have known that the price differential could not be cost-justified (R. 5389). "These circumstances," the Commission stated (R. 5389), "existed at the time the Robinson-Patman Amendment to the Clayton Act became law, and their existence imposed upon respondent the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute." In the Commission's view, Standard's failure to make any bona fide attempt to do so further negatived its claim that it had granted the tank-car price to its four "jobber" customers in "good faith."

In conclusion, the Commission stated (R. 5389–5390):

> It is also important that the respondent necessarily knew at the time of the passage of the Robinson-Patman Act, and at all times thereafter, that its standard for granting tank-car prices on its gasoline was in all substantial respects the same as the standard used by its major competitors. It was evidently then relying, as it is now relying, upon the position that so long as the pricing method in existence prior to the passage of the Robinson-Patman Act remains unchanged it can defend its price discriminations on the ground that its lower prices were granted in good faith to meet

equally low prices of its competitors. Upon this same theory, respondent's competitors, including the three against whom similar charges of price discriminations are pending, might also defend their similar price differences on the ground of meeting respondent's equally low prices or the equally low prices of other competitors. The Commission does not construe the words "in good faith" in Section 2 (b) as permitting that result. In the circumstances shown to exist, the Commission does not believe that the statute provides a means of effectively insulating any particular pricing pattern from attack or that it guarantees that so long as a pricing pattern in effect prior to 1936 remains undisturbed price discriminations made pursuant to that pattern may be lawfully continued.

On the basis of these findings, the Commission issued a modified cease-and-desist order (R. 5391-5393).[8]

THE COURT OF APPEALS DECISION

On review, the court below set aside the Commission's order. The court held (R. 5502) that Stand-

[8] Two Commissioners dissented. In their view, Standard's grant of "jobber" status to the four large resellers "was not an arbitrary classification * * * in order to favor these four jobbers with lower prices, inasmuch as the companies were qualified for such status according to the commonly accepted standard in the industry" (R. 5416; see also R. 5405). The dissenting Commissioners further concluded "that respondent would have lost Ned's as a customer if it had not met its competitors' offers" (R. 5417), and that, with respect to Citrin-Kolb, Stikeman, and Wayne, "the decision of the respondent to retain its existing [pre-1936] pricing policy was necessary to meet the competition of respondent's competitors and to prevent the loss of its customer[s]" (R. 5419, 5418, 5420).

ard's "good faith" defense "was firmly established, and the Commission's reasoning by which it reached a contrary conclusion is untenable and must be rejected."

The court acknowledged the "fact that a reseller might obtain the tank car price only if it maintained a bulk plant with facilities for accepting delivery of gasoline in tank car quantities; had a business in excess of one million gallons of gasoline annually; had distribution equipment and adequate credit standing" (R. 5501). The court also apparently recognized that this policy was in accord with "the commonly accepted standards of the industry" (R. 5498, 5502). The court, however, rejected the Commission's contention that the findings brought the case within the doctrine of *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, and *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683. The court stated (R. 5500): "The system described and condemned in [those decisions] bears not the slightest resemblance to the pricing system which the Commission purports to detect in the instant situation." In addition, the court stated that it was "unable to discern any basis for the conclusion that [Standard's] prices 'were not the result of departures from a nondiscriminatory price scale' " (R. 5501).

The court also rejected the Commission's determination that Standard's failure to review its pricing policy after enactment of the Robinson-Patman Act further negatived Standard's claim of "good faith." According to the court, "If [Standard's] pricing

policy was lawful prior to the [Act] the same policy was lawful afterward" (R. 5499).

SUMMARY OF ARGUMENT

The illegality of Standard's price discrimination, apart from the Section 2 (b) defense, is undisputed. Section 2 (b) permits a seller to rebut a prima facie case against him "by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor."

In order to qualify for this defense, it must be shown, not only that the meeting of a competitor's lower price was necessary to prevent the loss of business, but, furthermore, that the discrimination was "in good faith." The burden of showing such justification is, of course, on the price discriminator. On the other hand, if the price discriminator sustains that burden, it is now settled that Section 2 (b) affords a complete defense. *Standard Oil Company* v. *Federal Trade Commission*, 340 U. S. 231.

This case is a sequel to the *Standard* case, *supra*. There, this Court, after holding that the Commission could not reject Standard's Section 2 (b) defense as a matter of law, remanded the case to the Commission with directions to make findings as to whether or not Standard's lower price to its so-called "jobber" customers had been granted in good faith to meet the equally low price of competitors. 340 U. S. at 238–239. On remand, the Commission concluded that Standard had failed to sustain its burden of proving its "good faith." The correctness of this ruling, set

aside by the court below, is the basic question now presented.

The Commission based its decision on three related grounds: (A) Section 2 (b) affords no justification for Standard's use of a general pricing system; (B) in any event, the "good faith" requirement is not satisfied by a showing that Standard's pricing system is also used by some of its competitors; (C) Standard's failure to make a bona fide effort to establish a nondiscriminatory pricing system further negatives its claim of "good faith."

A

Section 2 (b) affords no justification for Standard's use of a general pricing system. *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746; *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683; *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419.

1. a. As this Court held in *Staley* and *Cement*, Section 2 (b) "does not concern itself with pricing systems" (*Staley*, p. 753; *Cement*, p. 725), does not permit a seller "to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others" (*Cement*, p. 725), and relates only to "individual competitive situations" (*Staley*, p. 753; *Cement*, p. 725). This doctrine was reaffirmed by the Supreme Court as recently as last Term in *National Lead*, *supra*. There this Court held (p. 431) that a seller could not "plead this section in defense of the use of an entire pricing system."

b. The very phraseology of Section 2 (b) shows a limitation of the defense to "individual competitive situations" as distinguished from "pricing systems."

Moreover, the indispensable prerequisite for applying the Section 2 (b) defense is a *reduction* from the seller's customary price scale. There is no such reduction where (as here) the seller's price scale is itself discriminatory and where the discrimination consists merely of the regular use of the price scale.

In those circumstances, there is also an inherent danger that the seller will attempt to manipulate its over-all price scale upward for the purpose of offsetting any reduction in its profits because of the relatively "lower" price regularly granted to the preferred customers.

c. Here, the Commission found that none of the discriminations in issue represented a departure by reason of competition from Standard's established system of pricing—a system, moreover, adopted and followed by Standard long before the passage of the Robinson-Patman Act in 1936. In short, not once did Standard, in granting the lower tank-car price, ever make a *reduction* from its customary price scale; the discrimination lay in the regular use of the dual price formula itself.

Nevertheless, the court below sought to distinguish *Staley* and *Cement* by a comparison of the pricing system involved in those cases— the so-called basing-point system—with Standard's pricing method. The attempted distinction is without basis in principle. As the explicit holdings of *Staley* and *Cement* make clear, the controlling factor is that Section 2 (b) cannot be

used in defense of the use of a pricing system, regardless of differences which may exist among various types of pricing systems.

Nor can this case be properly distinguished on the ground, suggested by the court below, that the basing-point system involved in *Staley* and *Cement* was "utilized to stabilize or increase but never to lower prices." Even apart from probable inaccuracy of this description of the basing-point system as to some situations, the record is completely devoid of any showing by Standard—which has the burden of proving the "good faith" defense—that the result of its pricing method has been to lower prices.

Nor can *Staley* and *Cement* be distinguished on the ground that the prices allegedly being met by the sellers in those cases were a part of a pricing system which had been adjudicated to be unlawful. The explicit holding of those decisions is not nearly so restrictive. If any doubt ever existed on the matter, it was dispelled by *National Lead, supra.* Of course, if the competitor's price is found to be illegal, that ends the matter. But such a finding is surely not indispensable.

Any argument to the contrary, moreover, necessarily collides with the well-settled rule that the burden of proof as to every element of the Section 2 (b) defense is on the price discriminator—not the Commission.

And, finally, it should be noted that, to the extent that the pricing policies of Standard's competitors are in fact identical to Standard's policies, they of course suffer from the same legal infirmities.

2. a. The court below further stated that it was "unable to discern any basis for the conclusion that [Standard's] prices 'were not the result of departures from a nondiscriminatory price scale.'" This statement, if it is intended to suggest that the granting of the tank-car price to the four so-called "jobbers" represented departures from a non-discriminatory price scale, is palpably erroneous.

Any such suggestion is flatly contradicted, not only by the Commission's findings of fact, but also by Standard's own admissions in the prior proceedings in this case. Indeed, the Commission's findings of fact rest almost exclusively on these admissions. See Statement, *supra*, pp. 5–7, 10. And Standard's 1950 brief in this Court is to like effect. At this point in the proceeding, Standard can scarcely be allowed to disavow these admissions or deny their truthfulness.

b. According to those admissions, Standard departed in only one instance from its "system and practice of selection and classification of customers." This one instance, however, is no longer in issue; and the court below erred in relying on that conceded "exception" as a basis for suggesting that Standard did not employ a general pricing system.

Furthermore, any evidence of "bargaining and haggling" between Standard and the four large resellers prior to their classification as so-called "jobbers" would be completely consistent with the Commission's determination—and Standard's admission—that the discriminations charged in the complaint were part and parcel of a "system and practice of selection and classification of customers." So long as an inherently

discriminatory price scale is "an integral and basically essential part thereof," it is only inevitable that "non-jobber" customers (assuming they could meet Standard's fixed requirements) will seek to be classified as "jobbers" (and thus obtain the relatively lower tank-car price). The mere fact that over the years there may be some slight change in the beneficiaries of Standard's "system and practice" certainly does not disprove Standard's use of such a "system and practice."

B

There are also other compelling reasons for rejecting Standard's Section 2 (b) defense. Of primary importance in this regard is the nature of the competitors' prices allegedly met by Standard. In the Commission's view, the "good faith" requirement is not satisfied by a showing that Standard's pricing system is also used by some of its competitors.

On the basis of substantially the same "system and practice" followed by Standard, these competitors likewise classify certain customers as "jobbers" and accord them the tank-car price. And, since both Standard and these competitors select "jobbers" on the basis of "the commonly accepted standards of the industry," it may well be the Standard would (at least temporarily) lose its four "jobber" customers if it stopped granting them the tank-car price. The reason, of course, is the strong possibility that these four "jobber" customers could obtain "jobber" classification—and hence the tank-car price—from Standard's competitors employing the same "system and practice."

The Commission, however, refused to accept Standard's possible loss of the four "jobber" customers *under those circumstances* as justifying Standard's continued adherence to its dual price formula. As this Court held in *Staley*, the Section 2 (b) defense is concerned with the matching of prices "in individual competitive situations," not the matching of pricing systems. To make the loss of customers the *sole* criterion of "good faith" is to extract all meaning from the "good faith" requirement.

Moreover, if a discriminatory pricing system could be justified as a "good faith" meeting of a competitor's equally low price merely because competitors are using a comparable system, the Robinson-Patman Act would be effectively nullified in large measure. Such a construction would immunize from the Act's requirements every established industry-wide systematic and discriminatory method of pricing. The Act, the Commission properly held, precludes such consequences.

C

The Commission further found that the circumstances which existed at the time of the passage of the Robinson-Patman Act "imposed upon [Standard] the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute" and that Standard "neither did this nor made any bona fide attempt to do so" (R. 5389). In this regard, the Commission found that at all relevant times Standard knew or should have known of the probability of competitive injury resulting from its pricing policy (R. 5389) and

knew or should have known that the price differential could not be cost-justified (R. 5389). Thus, despite knowledge of the discriminatory and injurious nature of its pricing system, Standard took no steps after passage of the Robinson-Patman Act to rid itself of that system but instead simply followed the industry pattern. Compare *Staley*, 324 U. S. at 757. Such conduct, in the Commission's view, further negatived Standard's claim of "good faith."

The court below, however, held that, "If [Standard's] pricing policy was lawful prior to the [Robinson Patman] amendment the same policy was lawful afterward." This holding, which flatly ignores the important changes brought about by passage of the Robinson-Patman Act, cannot be sustained.

ARGUMENT

A SELLER'S REGULAR USE OF AN INHERENTLY DISCRIMINATORY PRICING SYSTEM CANNOT BE JUSTIFIED AS A "GOOD FAITH" MEETING OF COMPETITION ON THE GROUND THAT COMPETITORS REGULARLY USE THE SAME DISCRIMINATORY SYSTEM

At the outset, it should be emphasized that the illegality of Standard's price discrimination, apart from the Section 2 (b) defense, is undisputed.

In the Detroit area, Standard sold gasoline to 362 dealers who resold at retail to the general public. Of these 362, four large dealers (three of whom also sold at wholesale) were granted the so-called tank-car price; Standard charged the other 358 dealers the higher tank-wagon price. Although Standard designated the first group "jobbers," the fact is that mem-

bers of the two classes directly competed one against another in selling at retail; indeed, one of the so-called "jobbers" sold *exclusively* at retail. Cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473–475. Standard no longer challenges the Commission's findings that Standard's "jobber" classification was arbitrary, that the discrimination in favor of the four so-called "jobbers" was not cost-justified, and that the discrimination caused injury to competition. Cf. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37; *Federal Trade Commission* v. *Ruberoid Co.*, *supra*. Thus, unless the Section 2 (b) defense is applicable here, Standard's grant of the tank-car price to the so-called "jobber" retailers is plainly unlawful under the Clayton Act.

Section 2 (b) provides in pertinent part:

> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price * * *, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing *that his lower price* * * * to any purchaser or purchasers *was made in good faith to meet an equally low price of a competitor* * * *. [Emphasis added.]

In order to qualify for the defense set forth in the proviso, it must be shown, not only that the meeting of a competitor's lower price was necessary to pre-

vent the loss of business, but furthermore that the discrimination was "in good faith." *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 755, 757; *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, 244.[9]

The burden of proving such justification is, of course, on the price discriminator. See, *e. g.*, *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, *supra*, at 753; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 45. On the other hand, if the price discriminator sustains that burden, it is now settled that Section 2 (b) affords a complete defense. *Standard Oil Company* v. *Federal Trade Commission*, 340 U. S. 231.

This case is a sequel to *Standard Oil Company* v. *Federal Trade Commission*, *supra*.[10] There this Court, noting that the Commission had rejected Standard's Section 2 (b) defense as a matter of law and had not made any findings as to whether or not Standard's lower price to its so-called "jobber" customers had been granted in good faith to meet the equally low

[9] As this Court stated in *Standard* (340 U. S. at 234):

> * * * under the Act, the lower price to the jobbers was justified if it was made to retain each of them as a customer *and* in good faith to meet an equally low price of a competitor. [Emphasis added.]

With respect to the *Staley* case, there is no doubt that Staley, when it entered the glucose business, found it necessary to meet the prices of competitors already established in that field; yet the Court emphasized that any such meeting of competition had to be "in good faith" (p. 757).

[10] In that posture of the case, the Department of Justice did not join in defending the Commission's order because of the Department's view that the Commission's construction of Section 2 (b)—to the effect that it did not provide a complete defense—was er-

price of competitors (340 U. S. at 238–239), remanded the case to the Commission with directions to make those findings (340 U. S. at 238, 251).[11] On remand, relying principally on the doctrine of *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, and *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, the Commission concluded that Standard had failed to sustain its burden of proving its "good faith."

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roneous as a matter of law. On the other hand, it is the Department's view that the decision below, setting aside the Commission's decision on remand, is similarly erroneous.

Since in its decision the Court of Appeals did not reach any question relating to the scope of the Commission's order, no discussion of such questions appears necessary or appropriate at this stage.

[11] The court below (R. 5497–5498) appears to suggest that the Commission and this Court, at prior stages in this proceeding, impliedly recognized Standard's "good faith." Any such suggestion is without foundation. As pointed out in the Statement (*supra*, pp. 7–8) and in the text above, although Standard's "good faith" was *assumed* for argument purposes, the issue was not decided by either the Commission or this Court because of the nature of the Commission's construction of the statute. And this Court remanded the case to the Commission for findings on that very issue (340 U. S. at 238, 251).

The court below is also in error in stating that the trial examiner recognized Standard's "good faith." Such a finding, as the Commission noted (R. 5382), was not made by the examiner, although he did find that the discriminations were made to meet competition (R. 5104). Moreover, since the *Staley* case (1945) was decided *subsequent* to the examiner's report (1943), he could not possibly have considered the impact of that decision or the still later *Cement* decision (1948). In addition, under the Commission's rules then in effect, the examiner's report was only advisory, as the report itself states (R. 5128). 5 Fed. Reg. 2423, 2426, as amended, 6 Fed. Reg. 832, 833; 16 C. F. R. § 2.20 (Cum. Supp. 1938–1943). Such a report did not even have the effect of an initial decision, as is now the case under the Administrative Procedure Act, 5 U. S. C. 1007, enacted in 1946. See 11 Fed. Reg. 7069.

The correctness of this ruling, set aside by the court below, is the basic question now presented.

The Commission found that Standard, *because major competitors used the same dual price formula,* had substantial reasons for believing that it might lose its four "jobber" accounts if it refused them the lower tank-car price.[12] But this finding, the Commission held, was not determinative. In the Commission's view, "the real question is whether or not the actions of the respondent in granting or continuing to these four dealers the tank-car price pursuant to and in accordance with its general policy can be said to have been made in good faith within the meaning of Section 2 (b)" (R. 5388).

Resolving this question adversely to Standard, the Commission emphasized that the grant of the tank-car price to the "jobber" customers was not a departure by reason of competition from Standard's established method of pricing but represented only

[12] The Commission's statement is as follows (R. 5388):

> It may well be that respondent was convinced that if it ceased granting tank-car prices to Citrin-Kolb, Wayne, and Stikeman and continued to refuse the tank-car price to Ned's Auto Supply Company it would lose these accounts. It had substantial reasons for believing this to be the case; for all of these concerns, except Ned's Auto Supply Company, had already been recognized as *entitled to the tank-car price under the commonly accepted standards of the industry*, and Ned's had achieved a volume of distribution which brought it within the range where it was likely to be so recognized by a major oil company at any time. Thus, the real question is whether or not the actions of the respondent in granting or continuing to these four dealers the tank-car price pursuant to and in accordance with its general policy can be said to have been made in good faith within the meaning of Section 2 (b). [Emphasis added.]

the continued application of that method—a method, moreover, adopted and followed by Standard long before the passage of the Robinson-Patman Act in 1936 (R. 5389). In short, not once did Standard, in granting the lower "tank-car" price, ever make a *reduction* from its pre-existing price scale; the discrimination lay in the regular use of the industry-wide dual price system itself.

"Good faith", the Commission concluded, was lacking here for three related reasons: (A) Section 2 (b) affords no justification for Standard's use of a general pricing system; (B) in any event, the "good faith" requirement is not satisfied by a showing that Standard's pricing system is also used by some of its competitors; (C) Standard's failure to make a bona fide effort to establish a non-discriminatory pricing system further negatives its claim of "good faith." These three reasons are discussed in the succeeding three sections of this brief.

A. SECTION 2 (b) AFFORDS NO JUSTIFICATION FOR STANDARD'S USE OF A GENERAL PRICING SYSTEM

1. *The "good faith" defense applies only in individual competitive situations*

a. *The doctrine of the Staley and Cement decisions*

The *Staley* case presented the same basic question. There, as in the instant case, the sellers "never attempted to establish their own non-discriminatory price system, and then reduce their price when necessary to meet competition. Instead, they slavishly followed in the first instance a pricing policy which, in their case, resulted in systematic discriminations * * *" (324 U. S. at 754–755). There, too, the

ttempt was made under Section 2 (b) to justify this iscriminatory pricing policy on the ground that the ellers' competitors maintained a similar pricing pol-y. In rejecting this defense, this Court pointed out 324 U. S. at 753):

> But § 2 (b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition.

The Court added (324 U. S. at 757): "We cannot say hat a seller acts in good faith when it chooses to dopt such a clearly discriminatory pricing system, at east where it has never attempted to set up a nonliscriminatory system * * *."

And, three years later in the *Cement* case, this Court said (333 U. S. at 725):

> Section 2 (b) permits a single company to sell one customer at a lower price than it sells to another if the price is "made in good faith to meet an equally low price of a competitor." But this does not mean that § 2 (b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others. We held to the contrary in the *Staley* case. There we said that the Act "speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' The Act

> thus places emphasis on individual competitive situations, rather than upon a general system of competition."

Accordingly, the seller's Section 2 (b) defense was rejected since the discriminations involved there were employed "as a practice rather than as a good faith effort to meet 'individual competitive situations'" (*ibid.*).

The *Staley-Cement* doctrine was reaffirmed by this Court as recently as last Term. In *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419 (decided subsequent to the decision below), it was contended that the Commission's order, forbidding *inter alia* use of a zone pricing system for the purpose (or with the effect) of matching competitors' prices, deprived the seller of the benefits of Section 2 (b). While pointing out that Section 2 (b) was necessarily read into every Commission order, this Court warned that Section 2 (b) "does not concern itself with pricing systems" (p. 426) and that "[t]his is not to say that a seller may plead this section in defense of the use of an entire pricing system. The section is designed to protect competitors in individual transactions" (p. 431).

b. *The reasons underlying the Staley-Cement doctrine*

As the Court pointed out in *Staley* (324 U. S. at 753), the very phraseology of Section 2 (b) shows a limitation of the defense to "individual competitive situations" as distinguished from "pricing systems." See *supra*, p. 27. While this fact, coupled with this Court's decisions in *Staley*, *Cement*, and *National*

Lead, would seem to be conclusive of the matter, it is nevertheless appropriate, we believe, to point out below some of the other reasons supporting this construction of the statute (see also *infra*, pp. 46–52).

The indispensable prerequisite for applying the Section 2 (b) defense is a *reduction* from a pre-existing non-discriminatory price scale. See, *e. g.*, the *Staley* case, 324 U. S. at 754–755. Stated otherwise, the theory of the Section 2 (b) defense is that a seller whose price scale is otherwise lawful should not be precluded from making a discriminatory *departure* from its price scale if the exemption is deemed necessary in order to retain a customer in the face of a competitive raid. The result is to sanction a degree of price flexibility; the importance of this flexibility in harmonizing the various antitrust laws was emphasized by this Court in its 1951 *Standard* decision (340 U. S. at 248–250).

However, where (as in the instant case) the seller's price scale is itself discriminatory and where the discrimination consists merely of the regular use of the price scale, there has been no reduction or departure in response to a competitive offer, and Section 2 (b) accordingly affords no justification for the seller's future adherence to its discriminatory price scale. Nor would it be material if it could be shown that subsequently a competitor offered the seller's preferred customers a price comparable to the seller's "lower" price. Even assuming *arguendo* that the seller's future adherence to its discriminatory price scale in those circumstances could be said to constitute meeting competition, it could not be said to be in "good faith," at least in the absence of a bona fide effort by the seller to adopt a non-

discriminatory price scale. *Staley*, 324 U. S. at 754, 757.

In addition, where the discrimination is a permanent part of a pre-existing system or formula, there is an inherent danger that a seller in Standard's position will attempt to manipulate its overall price scale (both the tank-car and tank-wagon prices) upward for the purpose of offsetting any reduction in its profits because of the discount regularly granted to the "jobber" accounts.[13] (This danger is particularly serious where, as here, competitors employ the same dual price formula.) On the other hand, where actual reductions from a non-discriminatory price scale are made "in individual competitive situations," the probability that the consuming public will have to subsidize the price discrimination is considerably lessened; as to those transactions, it is more likely that the seller will itself bear any "loss."

c. The applicability here of the Staley-Cement doctrine

The court below sought to distinguish *Staley* and *Cement* by contrasting the pricing system involved in those cases—the so-called basing-point system—with

[13] Cf. Senator Logan's comment on the Robinson-Patman bill: "Discriminations not in accord with sound economy generally involve an element of loss, either of the necessary minimum of profits or perhaps of actual cost, and this loss of profits must be recouped from the business of customers which do not receive the benefits of such discriminations." 80 Cong. Rec. 3113.

Similarly, Congressman Utterback said: "Discriminations of the kind forbidden by this bill involve a loss to the seller of his necessary profit and cost on the favored customer's business; and that loss the seller is compelled to make up in higher prices to his other customers, or his business will land in the red." 80 Cong. Rec. 9416.

Standard's pricing method.[14] The attempted distinction is without basis in principle. Both systems were found to be inherently discriminatory. The discriminations arise in the one by reason of location of customers and in the other by reason of classification of customers. But this difference does not warrant any difference in application of the underlying doctrine that Section 2 (b) does not provide justification for *systems* of pricing.

Standard's pricing policy (like the system in *Staley* and *Cement*) represented a general method of competition used not only by Standard but also by major competitors (R. 5388). Standard's tank-car price was granted to those reseller accounts that were classified by it as "jobbers" but without regard to the manner in which they resold (*i. e.*, wholesale or retail).[15] This price was granted pursuant to, and was not a variation from, Standard's established pricing policy. Whether the discriminations arise from the use of a basing-point system, or from a system of arbitrarily classifying customers, is not controlling; for, as this Court emphasized in *Staley*, *Cement*, and *National Lead*, Section 2 (b) "does not concern

[14] But cf. three recent decisions by differently composed panels of the Seventh Circuit: *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, 155–156, pending on petition for certiorari, No. 101, this Term; *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253, 255, certiorari denied, 353 U. S. 938; *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37, 41, pending on writ of certiorari, No. 110, this Term.

[15] This Court has decided that discriminations cannot be disguised by classifications that do not follow real functional differences. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 474–475.

itself with pricing systems" (*Staley*, p. 753; *Cement*, p. 725; *National Lead*, p. 431), does not permit a seller "to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others." (*Cement*, p. 725), and relates only to "individual competitive situations" (*Staley*, p. 753; *Cement*, p. 725; *National Lead*, p. 431). This rationale is equally applicable here.

Nor can this case properly be distinguished on the ground, suggested by the court below, that the basing-point system involved in *Staley* and *Cement* "was utilized to stabilize or increase but never to lower prices." First, we believe the court's statement is probably inaccurate with respect to many customers of a seller employing a basing-point system. See *Corn Products Co.* v. *Federal Trade Commission*, 324 U. S. 726, 731, 732.[16] Secondly, and in any event, the record is completely devoid of any showing by Standard—which has the burden of proving its "good faith"

[16] The basing-point system commonly involves both "phantom freight" and "freight absorption." Where "phantom freight" is charged to the seller's nearby customers, the effect is to charge *more* than if the seller had charged on an "f. o. b. mill" basis. It is this type of discrimination which was emphasized by the *Staley* decision, 324 U. S. at 754. On the other hand, where there is "freight absorption" on sales to distant customers, the effect is to charge *less* than if the seller had charged on an "f. o. b. mill" basis. It was precisely this distinction which the court below, in the *Cement* case, relied upon in holding that systematic "freight absorption" was in "good faith." *Aetna Portland Cement Co.* v. *Federal Trade Commission*, 157 F. 2d 533, 560–561 (C. A. 7). This Court, however, rejected the suggested distinction, stating "Nor can we discern under these circumstances any distinction between the 'good faith' proviso as

defense—that the result of its pricing method has been lower prices. Certainly, no such assurance can be deduced from the mere fact that a price discrimination exists. On the contrary, as already pointed out (*supra*, p. 30), there is an inherent danger that a seller in Standard's position will attempt to manipulate its over-all price scale (both the tank-car and tank-wagon prices) upward for the purpose of offsetting any reduction in its profits because of the relatively "lower" prices granted to the "jobber" accounts.

Finally, the court below stated (R. 5500):

> The gist of the reasoning of the Supreme Court in those cases [*Staley* and *Cement*] was that the pricing system being illegal, all prices determined thereby were illegal. It follows, according to such reasoning, that the meeting by the seller of a competitor's unlawful price precludes the seller from reliance upon a "good faith" defense.

As the *Staley* and *Cement* opinions themselves make clear, the "gist of the reasoning" of those cases is not nearly so restrictive. Moreover, the evils involved are essentially the same regardless of whether there has been an adjudication that the competitor's "equally low price" is illegal. The controlling factor, we emphasize, is that Section 2 (b) "does not concern itself with pricing systems," does not permit

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applied to a situation involving only phantom freight and one involving only freight absorption. Neither comes within its terms." *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 725.

It should also be noted that establishment of a "punitive base" may well result in lower delivered prices to certain customers. See, *e. g.*, 157 F. 2d at 564-565.

a seller "to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others," and relates only to "individual competitive situations." 324 U. S. at 753; 333 U. S. at 725.

If any doubt ever existed on the matter, it was dispelled by this Court's recent *National Lead* decision. No adjudication has been made in that case that the individual non-collusive use of a zone-pricing system was illegal; in fact, the Commission expressly reserved decision on that issue (see 352 U. S. at 424). The sellers argued that, since there had been no adjudication of illegality, they should be permitted to use zone pricing to meet competition and that Section 2 (b) gave them that right. As we have already noted, this Court (p. 431) pointed out that Section 2 (b) is incorporated in every Commission order, but added (p. 431): "This is not to say that a seller may plead this section in defense of the use of an entire pricing system. The section is designed to protect competitors in individual transactions."

Thus, a finding of illegality of a competitor's "equally low price" is not a prerequisite to application of the *Staley-Cement* doctrine; "good faith" under Section 2 (b) and "the use of an entire pricing system" are simply incompatible. Of course, if the competitor's price is found to be unlawful, that ends the matter.[17] But such a finding is surely not indispensable.

[17] See also *infra*, pp. 46–52.

Any argument to the contrary, moreover, necessarily collides with the rule, well settled by both statute and decision, that the burden of proof as to every element of the Section 2 (b) defense is on the price discriminator—not the Commission.[18] See *supra*, p. 23. In this connection, it is significant, as the opinion below notes (R. 5500–5501), that this Court's 1951 opinion in *Standard* appears to suggest that proof of the *lawfulness* of the competitor's "equally low price" is an essential part of a seller's "good faith" defense. 340 U. S. at 238, 246, 247–249, n. 14. The Commission has not construed the 1951 decision in that manner, presumably in part because of difficulties which any seller might have in making such proof. But it certainly does not follow that the Commission should as a consequence be saddled with the contrary burden—*i. e.*, the burden of proving the *unlawfulness* of the competitor's "equally low price." As already pointed out, it is the price discriminator—not the Commission—which has the burden as to every element of the Section 2 (b) defense. If Standard does not have the burden of proving the *lawfulness* of the "equally low price" it allegedly met, then *a fortiori* the Commission does

[18] Obviously, as a practical matter, the price discriminator cannot be expected to adduce evidence of the unlawfulness of its competitor's price. Therefore, unless the Commission assumed that burden, there would be no evidence on which the Commission could make a finding that the competitor's price is unlawful. If such a finding were indispensable to application of the *Staley-Cement* doctrine, as the court below suggests, then the Commission would be required either to assume the burden in this regard or to let "good faith" defenses be established by default.

not have the burden of proving the *unlawfulness* of that price.

It should also be noted that, while it is true that in this proceeding the Commission did not actually adjudicate the legality of the competing prices which Standard allegedly met, the Commission issued similar complaints against three of Standard's competitors, and, after dismissal of those complaints without prejudice, initiated a new investigation based on essentially the same charges.[19] In addition, Standard has insisted that its pricing policies—which the Commission did find to be unlawful—were identical to those of its competitors, and in fact based its Section 2 (b) defense on that ground. In these circumstances, it cannot be said, as the court below remarked, that there is "no contention and not even a suspicion but that the competing prices which [Standard] met were lawful" (R. 5501). To the extent that the pricing policies of Standard's competitors are in fact identical to Standard's policies, they, of course, suffer from the same infirmities.

2. *Standard's admissions in the prior proceedings establish that its price discriminations were pursuant to a general pricing system*

In the *Staley* case, the court below had similarly set aside the Commission's order. In reinstating the Commission's order, this Court admonished reviewing tribunals that "Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices,

[19] See note 27, *infra*.

acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission." 324 U. S. at 758. The Court added (p. 760) that "[t]he appraisal of the evidence and the inferences to be drawn from it are for the Commission, not the courts."

a. *Standard's alleged "reductions"*

In the instant case, after referring to the above-quoted statement, the court below found it inapplicable on the ground that "the Commission's decision on the 'good faith' issue is the result of its reasoning, legal in nature * * *" (R. 5497). Nevertheless, later in its opinion, the court stated (R. 5501):

> Moreover, we are unable to discern any basis for the conclusion that [Standard's] prices "were not the result of departures from a non-discriminatory price scale." The record affirmatively demonstrates to the contrary. [Standard] sold invariably at its uniform tank-wagon price, except when at different times it reduced its price to meet competitive offers in order to retain a customer. [Standard] had 362 Detroit customers, only four of which purchased at prices reduced from its uniform tank-wagon price.

This statement, if it is intended to suggest that the granting of the tank-car price to the four so-called "jobbers" represented departures from a non-discriminatory price scale or that the tank-car price was not an established part of Standard's price scale, is palpably erroneous. Any such suggestion is flatly contradicted, not only by the Commission's findings of fact, but also

by Standard's own admissions in the prior proceedings in this case. Indeed, the Commission's findings of fact rest almost exclusively on these "judicial" admissions.[20]

Thus, in Paragraphs 16 and 17 of its answer (reproduced in the Appendix, *infra*, pp. 60–63), Standard described in some detail "its *general policy and practice* of bona fidely selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers" (emphasis added). Standard stated "that such *system and practice* of selection and classification of customers" was a common one in the oil industry; "that as a result of such necessary selection and classification of customers, and *as an integral and basically essential part thereof,* and of the system of commercial economy which makes such classifications necessary, differences in prices of the same commodities are made to customers selected and falling within different classifications, and *purchasers falling within the classification of wholesalers or jobbers of gasoline are entitled to purchase at tank car prices as distinguished from dealer tank wagon prices at which gasoline is sold to retail resellers*" (emphasis added).[21] Standard further stated that a customer, in order to be accorded a "jobber" classification, must meet certain requirements (*e. g.*, a certain volume of business); that each of Standard's

[20] "Judicial" admissions (as distinguished from extra-judicial admissions) include admissions made by a party in the course of any adjudicative proceeding. See IX Wigmore on Evidence (3d ed.) § 2590.

[21] And note Standard's repeated reference in its answer to the "regular tank car price" and "regular tank car basis" (R. 10–11).

four "jobber" customers met those requirements; "that said four customers are each bona fidely qualified to be regarded and are regarded by the oil industry in Detroit as within the classification of wholesale or jobber customers"; and "that said four customers and each of them are legitimately and lawfully entitled to purchase gasoline, and Respondent [Standard] is entitled to sell them gasoline, within their classification as wholesalers or jobbers and at prices which are or may be at the time different and lower than prices charged by Respondent for the same product to Respondent's retail reseller customers without regard to any other consideration * * *."

The Commission's basic findings do little more than rephrase these admissions, except that the Commission rejected Standard's conclusory allegation that its "system and practice of selection and classification of customers" was a lawful one under the Act.

Nor did Standard ever disavow these admissions during the course of the extensive hearings in the case. On the contrary, Standard introduced voluminous evidence *supporting* its statements in the answer. Standard's witnesses testified that there were specific requirements for a "jobber" status (R. 1890–1891); that the four large reseller accounts involved here met those requirements (R. 1895); that it did not accord "jobber" status to any reseller that did not meet those requirements (R. 172–174, 2084–2088, 2124); that it would rather lose "jobber" accounts than depart from those requirements (R. 1912–1916); that it had but two prices for resellers' accounts—one for "jobber" accounts and one for ordinary resellers (R. 167–

169, 1899).[22] This testimony, it should be repeated, was offered by Standard itself (the Commission's evidence was merely corroborative). And Standard's 1950 brief in this Court is to like effect.[23]

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[22] For example, the manager of Standard's Detroit Division said of these four resellers: "We sell them on our regular reseller tank car basis * * *" (R. 116). And, Marshall, the manager of Standard's gasoline and refined oil department, explained that: "* * * In the oil industry we have a carload price [tank-car] and a tank wagon price and those who operate service stations have a service station price and these are the three units of purchase. We don't operate on the basis of a list price from which various deductions are made" (R. 1100).

It was also emphasized by Standard's witnesses that this system of pricing was used not only in Detroit (R. 1890, 1897, 2065) but elsewhere in the country (R. 943, 1060, 1064, 1075, 1890) and not only by Standard but also by some of its major competitors including Texas, Gulf, and Shell (R. 319–320, 941, 1072, 1897).

[23] Brief for Petitioner, *Standard Oil Co. v. Federal Trade Commission*, No. 1, 1950 Term: "This case concerns exclusively petitioner's sale of gasoline in the region of Detroit, Michigan, to two classes of customers: (a) to approximately 358 independent retail service stations buying in tank wagon quantities; and (b) to the four jobbers buying in larger tank car quantities.

"Petitioner sold to all its service station customers at the same price—*i. e.*: the tank wagon price (R. 5058, 131, 161). The deliveries made by tank wagon to these service stations averaged 700 to 800 gallons (R. 112).

"Petitioner sold to all its jobber customers at the same price—*i. e.*, the tank car price." (p. 3, footnote omitted.)

* * * * *

"Citrin, Wayne and Stikeman during 1936–40 and Ned's during 1938–40 'under industry practice and contemplation were bona fide jobbers' (R. 5098) because each of them maintained sufficient bulk storage to take delivery in tank car quantities, owned and operated tank wagons and other facilities for delivery to service stations, had an established business suffi-

At this point in the proceeding, Standard can scarcely be permitted to withdraw these admissions or deny their truthfulness. And Standard can have no real objection to the Commission's reliance on them. For, "it is fundamental that judicial admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them. A fact admitted by answer is no longer a fact in issue." *Hill* v. *Federal Trade Commission*, 124 F. 2d 104, 106 (C. A. 5). As Wigmore states, "The vital feature of a judicial admission is universally conceded to be its *conclusiveness* upon the party making it, *i. e.*, the prohibition of any further dispute of the fact by him, and of any use of evidence to disprove or contradict it" (italics in original). IX Wigmore on Evidence (3d ed.) § 2590 (citing numerous decisions).

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cient to insure purchases of from one to two million gallons a year, and had adequate credit responsibility (R. 5096–7–8), notwithstanding the fact that Ned's resold entirely at its own service stations to the consuming public and that the other three resold in part in the same way." (p. 4.)

* * * * * *

"* * * these customers all belonged to a distinct class of buyers, so recognized throughout the industry." (p. 42.)

* * * * * *

"It is patent that the Commission's Order strikes primarily at dual distribution in the same territory (see Point III, *infra*, p. 45). It is only because petitioner sells to two classes of customers in the same area, admittedly at the going price to each of them, that petitioner, to avoid the restrictions of Paragraph 6 of the Order, may find it necessary to discontinue dealing with one or the other." (p. 43.)

In this case, it was not until after the Commission's decision on remand that Standard attempted to deny what it had previously sought to prove—namely, that the granting of the tank-car price to its four "jobber" customers was pursuant to, and not a departure from, its "system and practice of selection and classification of customers." The label applied to it is of little consequence—"system," "formula," "policy," "method," "practice." What is important is that it "constantly results in [Standard's] getting more money for like goods from some customers than [it] does from others," and that it is not directed to "individual competitive situations." *Cement, supra,* p. 725; *National Lead, supra,* p. 431.

b. *Standard's alleged "bargaining and haggling."*

The court below further stated (R. 5501):

> The bargaining and haggling which took place between [Standard] and the four involved "wholesalers" prior to a reduction in prices to them is hardly consistent with the Commission's theory that prices were reduced pursuant to a system. For instance, [Standard] over many years refused to give Ned's, its "most valuable tank-wagon customer," any reduction at all despite persistent demands based upon competitive offers. Its reluctant grant of a ½¢ reduction in 1936, increased to 1½¢ in 1938 in response to an "ultimatum" by Ned's, would appear to dispel completely any idea that such reduction in price was systematic, as urged by the Commission.

This statement likewise ignores the Commission's evidentiary findings and Standard's admissions. The

tatement also misconceives "the Commission's heory"; for it was never "the Commission's theory hat prices were reduced pursuant to a system." On he contrary, as pointed out above, the Commission ound—as Standard had urged—that the discrimina-ions charged in the complaint did *not* represent *re-uctions* but rather only the regular application of a ng-established industry-wide "system and practice." According to Standard's answer (R. 11) and the stimony of its witnesses (R. 126, 130, 167–169), tandard departed from this "system and practice" only one instance—*i. e.*, when it granted Ned's a alf-cent reduction from the tank-wagon price in 936; its officials referred to this as an "exception" R. 167–169). This half-cent reduction to Ned's as accorded at a time when Ned's was still classified s a "non-jobber" dealer and is the only "lower price" this record which could possibly be construed to be "good faith" meeting of competition, since it does ppear to reflect a genuine effort to hold a customer nd it was not any part of Standard's regular sys-em of pricing. However, this half-cent reduction is ot a matter now at issue in this proceeding, and the ourt below plainly erred in relying on the conceded exception"—which is not material here—as a basis or suggesting that Standard did not employ a general ricing system. On the other hand, the tank-car price hich was later accorded to Ned's was found by the ommission to be granted, not in response to any ompetitive offer, but because Ned's at that time met he established requirements for classification as a jobber" by acquiring bulk storage facilities (R. 5389).

The Commission similarly found—as Standard had urged—that Standard's continuance of the tank-car price to the other three "jobbers" (Citrin-Kolb, Stikeman, and Wayne) merely reflected continued application of Standard's "system and practice." As to these three customers, each of whom had achieved "jobber" status and obtained the regular tank-car price some time before the passage of the Robinson-Patman Act, the record contains *no evidence* that Standard's "lower price" had been initially granted to meet a competitor's offer of an "equally low price."[24] In these circumstances, it is somewhat difficult to understand the reference of the court below (*supra*) to "bargaining and haggling which took place between [Standard] and the four involved 'wholesalers' prior to a reduction in price to them."

Moreover, any evidence of such "bargaining and haggling" would be completely consistent with the Commission's determination—and Standard's admission—that the discriminations now in issue were part and parcel of a "system and practice of selection and classification of customers." The principal vice of this "system and practice," according to the Commission, is the arbitrariness of the classification—*i. e.*, Standard's designation of certain customers as so-called

[24] With respect to any offers made to these three customers subsequent to their being accorded "jobber" status but prior to the passage of the Act, the Commission was of the view that those "which were not continuing offers, are not relevant to show that the specific discriminations in price made by respondent subsequent to June 19, 1936, were made in good faith to meet equally low prices of competitors" (R. 5387). The two dissenting Commissioners concurred in this view (R. 5416). And see note 6, *supra*.

"jobbers" (with the resultant tank-car price on *all* sales to them) regardless of the scope of their retailing operations and in fact regardless of whether they performed any "jobber" function at all. Cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 474–475. In that economic situation, it would be most surprising indeed if Standard's larger "non-jobber" retailers did not actively seek to be classified as "jobbers." The natural result would be "bargaining and haggling" (*i. e.*, negotiation), provided, of course, that the "non-jobber" could meet Standard's fixed requirements for "jobber" status. This type of "bargaining and haggling," however, does not disprove the existence of a "system and practice of selection and classification of customers," but on the contrary is perhaps an inevitable manifestation of it. Such a "system and practice" presupposes, by definition, some process "of selection and classification of customers"; any negotiation by non-favored customers to obtain "jobber" status is thus within the framework of the "system and practice," not outside it.[25] The mere fact that over the years there might be some slight change in the beneficiaries of Standard's "system and practice" is immaterial so long as an inherently discriminatory price scale is "an integral and basically essential part thereof" (R. 73).[26]

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[25] In contrast, Standard's 1936 grant to Ned's of a half-cent reduction—which is not in issue here—was not pursuant to Standard's "system and practice." See *supra*, pp. 10, 43.

[26] This conclusion is reinforced by Standard's failure to make a bona fide effort to rid itself of this "system and practice." See *infra*, pp. 52–58.

B. IN ANY EVENT, THE "GOOD FAITH" REQUIREMENT IS NOT SATISFIED BY A SHOWING THAT STANDARD'S PRICING SYSTEM IS ALSO USED BY SOME OF ITS COMPETITORS

As already shown (*supra*, pp. 26–28), it is established by this Court's decisions that Section 2 (b) affords no justification for a seller's use of a general pricing system—*i. e.*, "a sales system which constantly results in his getting more money for like goods from some customers than he does from others." It is also established by Standard's own admissions in the prior proceedings (*supra*, pp. 36–45) that the discriminations in issue here were pursuant to precisely such a system. Accordingly, we believe the Court need go no further and may reverse on that basis alone.

There are, however, other compelling reasons for rejecting Standard's "good faith" claim. Thus, even assuming *arguendo* (contrary to *Staley, Cement,* and *National Lead*) that Section 2 (b) could in some circumstances be employed in defense of a seller's general pricing system, it does not follow that Standard has sustained its burden. Of primary importance in this regard is the nature of the competitors' prices allegedly being met by Standard. In the Commission's view, the "good faith" requirement is not satisfied by a showing that Standard's pricing system is also used by some of its competitors.

According to Standard's admissions, Standard's dual price formula is used in the Detroit area not only by Standard but also by major competitors

such as Gulf, Texas, and Shell.[27] See *supra*, pp. 6, 28. In other words, on the basis of substantially the same "system and practice" followed by Standard, these competitors likewise classify certain customers as "jobbers" and accord them the tank-car price (R. 5388). And, since both Standard and these competitors select "jobbers" on the basis of "the commonly accepted standards of the industry" (R. 5388, 5416), it may well be that Standard would (at least temporarily) lose its four "jobber" customers if it stopped granting them the tank-car price. The reason, of course, is the strong possibility that these four "jobber" customers could obtain "jobber" classification—and hence the tank-car price—from Standard's competitors employing the same "system and practice."

[27] Similar charges of price discrimination were filed against these three companies in 1940. Proceedings thereon, in view of the pendency of this litigation, were deferred until April 3, 1957. On that date, the three complaints were dismissed without prejudice. The Commission's order in each case stated:

> It appearing that the complaint in this proceeding was issued November 29, 1940, and that the acts and practices alleged to have been unlawful all occurred more than sixteen years ago; and
>
> It further appearing that trial of the case has been held in abeyance pending final disposition of the proceeding in the matter of *Standard Oil Company*, Docket No. 4389, which proceeding is now before the United States Supreme Court for the second time; and
>
> The Commission being of the opinion that irrespective of the final outcome of said proceeding in the matter of *Standard Oil Company*, Docket No. 4389, it will not now be practicable to try the issues raised by the pleadings in this case; and, accordingly:
>
> It Is Ordered that the complaint herein be, and it hereby is dismissed, it being understood, however, that no decision

The Commission, however, refused to accept Standard's possible loss of the four "jobber" customers

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has been made on the merits of the case, and this action is without prejudice to the right of the Commission to conduct a further investigation into the respondent's business practices and to take such further action against the respondent at any time in the future as may be warranted by the then existing circumstances.

On June 18, 1957, the Commission announced a new investigation of the present conduct of the three companies in connection with essentially the same charges of price discrimination. The announcement stated:

> A dual system of pricing used by some major oil companies is currently being investigated by the Bureau of Investigation of the Federal Trade Commission, Harry A. Babcock, Chief of the Bureau, announced today.
>
> He said his office is investigating the effects of a system whereby oil producers sell to regular filling stations at one price and to some large competing operators, classified by the producers as "jobbers," at a lower price.
>
> In his announcement Mr. Babcock referred to the Commission's recent dismissal of complaints charging three major oil companies, Texas, Gulf and Shell, with engaging in this practice.
>
> Mr. Babcock said these complaints had been pending since 1939 awaiting a final decision in the Commission's similar proceeding against the Standard Oil Company of Indiana. (A Court of Appeals decision setting aside the Commission's order in that case has been appealed to the Supreme Court.)
>
> Mr. Babcock said the complaints against Texas, Gulf and Shell were dismissed because many of the witnesses who had been scheduled to testify when the complaints were first issued were no longer available and because of difficulties other witnesses might have in testifying about events that took place in the 1930's. In the Standard case, Mr. Babcock pointed out, the evidence is already a matter of record. He also noted that the Commission's dismissal order, issued April 2, made no decision on the merits of the cases and was without prejudice to the Commission's right to conduct further investigations.

under those circumstances as justifying Standard's continued adherence to its dual price formula.[28] As this Court held in *Staley*, the Section 2 (b) defense is concerned with the matching of prices "in individual competitive situations," not the matching of pricing systems. See *supra*, pp. 26–27. To make the loss of customers the *sole* criterion of "good faith"—as Standard argued below[29]—is to extract all

[28] Similar Commission rulings, although made on somewhat different facts, were recently upheld by another panel of the court below. *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, 155–156 (C. A. 7), pending on petition for certiorari, No. 101, this Term; *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253, 255 (C. A. 7), certiorari denied, 353 U. S. 938. Accord, *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37, 41 (C. A. 7), pending on writ of certiorari, No. 110, this Term. In all three of these cases, the Commission found that each seller's discriminations were only a reflection of its nation-wide pricing system formulated to meet competition generally.

[29] In its brief (pp. 14–15) in the Court of Appeals, Standard contended: "The Commission's own factual finding affirmatively demonstrates petitioner's good faith. The Commission did not attempt to overturn the finding of the trial examiner that petitioner's price reductions were granted solely to retain the business of four valuable customers. Instead, the Commission affirmed the examiner's factual analysis, and acknowledged that petitioner had 'substantial reasons for believing' that without reducing its prices 'it would lose these accounts' (R. 5388). This finding fully satisfies the tests of the Section 2 (b) defense as defined by the Supreme Court."

The finding in question is set forth in full in note 12, *supra*. As reference to the full finding will confirm, it does no more than recognize that, since Standard's pricing system is also used by Standard's competitors, Standard's failure to adhere to "*the commonly accepted standards of the industry*" (emphasis

meaning from the "good faith" requirement.[30] The argument also ignores what inevitably would be the practical consequences of its adoption.

If a discriminatory pricing system could be justified as a "good faith" meeting of a competitor's equally low price merely because competitors are using a comparable system, the Robinson-Patman Act would be effectively nullified in large measure. Such a construction would immunize from the Act's requirements every established industry-wide systematic method of price discrimination. It would, moreover, actually provide a positive incentive to competing suppliers to adopt parallel pricing systems so that each can defend its own system on the basis of similar systems used by others. The Act, the Commission properly held, precludes such consequences. See *Staley*, 324 U. S. at 754.[31]

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added) might (at least temporarily) cause the loss of its so-called "jobber" customers. Under the *Staley-Cement* doctrine, such a loss is in no sense determinative of Standard's "good faith," as the Commission held.

[30] See note 9, *supra*.

[31] In *Staley*, the Court rejected a comparable interpretation, pointing out (324 U. S. at 753–754): "* * * If respondents' argument is sound, it would seem to follow that even if the competitor's pricing system were wholly in violation of § 2 of the Clayton Act, respondents could adopt and follow it with impunity.

"This startling conclusion is admissible only upon the assumption that the statute permits a seller to maintain an otherwise unlawful system of discriminatory prices, merely because he had adopted it in its entirety, as a means of securing the benefits of a like unlawful system maintained by his competitors. * * * We think the conclusion is inadmissible, in view

For example, under the decision below, the Commission's complaint against Standard must fall because of the availability of an "equally low price" from Gulf, Texas, or Shell. Similarly, Gulf, Texas, and Shell can presumably defend the validity of their dual price formula because of the availability of Standard's "equally low price" (the tank-car price involved in this proceeding).[32] In other words, as long as competing sellers follow the same discriminatory price policies, each is protected. The result would be to insulate from attack a price pattern deeply entrenched in the industry—not only in the Detroit area, but also elsewhere in the country. (R. 319–320, 941, 943, 1060, 1064, 1072, 1075, 1897)—long prior to passage of the Robinson-Patman Act.

Conversely, the anomalous effect of such a construction would be to limit the impact of the Robinson-Patman Act to industries in which price discrimination is *not* as deeply entrenched—*i. e.*, industries where sellers do not follow parallel pricing policies. For example, in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, this Court upheld a Commission cease-and-desist order against a seller's

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of the clear Congressional purpose not to sanction by § 2 (b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another."

In the instant case, Standard—which has the burden of proof on the "good faith" issue—did not undertake to show the lawfulness of the dual price formulas of its competitors. See *supra*, pp. 35–36.

[32] See note 27, *supra*. Indeed, Standard's competitors would probably argue that Standard's "equally low price" had been adjudicated to be "lawful" if the decision below were affirmed.

use of a discriminatory "quantity discount system" (p. 41); and in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, the Court upheld a Commission cease-and-desist order against an arbitrary system (as in this case) of classifying customers for functional discount purposes. But if Section 2 (b)—as the decision below apparently holds—immunizes a seller as long as his competitors employ the same pricing system, then it necessarily follows that the Morton Salt Company and the Ruberoid Company could also have avoided liability simply by showing that their discriminatory practices are common in their respective industries. There is no basis, we submit, for imputing to Congress an intention to exempt from the Act those industries where price discrimination is most rampant.[33]

C. STANDARD'S FAILURE TO MAKE A BONA FIDE EFFORT TO ESTABLISH A NON-DISCRIMINATORY PRICING SYSTEM FURTHER NEGATIVES ITS CLAIM OF "GOOD FAITH"

In *Staley*, as in the instant case, the sellers "never attempted to establish their own non-discriminatory price system, and then reduce their price when necessary to meet competition. Instead they have slavishly followed in the first instance a pricing policy which, in their case, resulted in systematic discriminations * * *" (324 U. S. at 754–755). The Court held in part (324 U. S. at 757): "We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pricing system, at least where it has never attempted to set up a non-discriminatory system * * *."

[33] See note 31, *supra*, and note 34, *infra*.

Similarly here, in the course of its lengthy findings on the "good faith" issue, the Commission *inter alia* found that the circumstances which existed at the time of the passage of the Robinson-Patman Act "imposed upon [Standard] the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute" and that Standard "neither did this nor made any bona fide attempt so to do" (R. 5389). In this regard, the Commission found that at all relevant times Standard knew or should have known of the probability of competitive injury resulting from its pricing policy (R. 5389) and knew or should have known that the price differential could not be cost-justified (R. 5389). The Commission's exact language is as follows (R. 5388–5389):

> Respondent has had long experience in the sale and distribution of gasoline, both through service stations which it owned or leased and operated and through its bulk plants to service station operators. It follows that respondent is thoroughly familiar with the costs of operating retail service stations and bulk plants, with the margins of gross profits available to retail service stations and to operators of bulk plants, and with the competitive results which may be expected when some retailers receive lower prices than competing retailers. At all relevant times, respondent knew or had the means of knowing and should have known that the manner in which it priced and sold its gasoline continually created the probability of injury to competition between retail dealers who bought

> such gasoline at different prices and resold it in competition with one another. It also knew or should have known that the price differences which it granted could not be justified on the basis of differences in the cost of manufacture, sale and delivery resulting from differing methods or quantities in which its gasoline was sold or delivered. These circumstances existed at the time the Robinson-Patman Amendment to the Clayton Act became law, and their existence imposed upon respondent the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute. Respondent neither did this nor made any bona fide attempt so to do.

Thus, despite passage of the Robinson-Patman Act and despite knowledge of the discriminatory and injurious nature of its pricing system, Standard took no steps to rid itself of that system but instead simply followed the industry pattern. Compare *Staley, supra.* Such conduct, in the Commission's view, further negatived Standard's claim of "good faith."

The court below, however, denied that Standard had "the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute." According to the court (R. 5499): "If [Standard's] pricing policy was lawful prior to the [Robinson-Patman] amendment the same policy was lawful afterward." This holding completely ignores the important changes brought about by passage of the Robinson-Patman Act and recognized repeatedly by

this Court. *E. g., Staley, supra,* 324 U. S. at 752–753. The court below referred to this Court's statement in the 1951 *Standard* decision (340 U. S. at 242) that "None of these changes, however, cut into the actual core of the defense." But the obvious meaning of this remark is shown by the further statement in the same opinion (340 U. S. at 251) that "* * * the proviso [2 (b)] is readily understandable as simply continuing in effect a defense which is *equally absolute, but more limited in scope* than that which existed under § 2 of the original Clayton Act" (emphasis added). See also 340 U. S. at 248, n. 14. Indeed, a mere comparison of the language of the Act before and after the amendment is sufficient to establish beyond question that the requisites of the "good faith" defense were substantially changed; and, if any possible doubt remained, the legislative history is fully dispositive.[34]

[34] As introduced, neither the House nor the Senate bill contained a provision similar to that in the original Section 2 of the Clayton Act, which read: "*Provided*, That nothing herein contained shall prevent * * * discrimination in price in the same or different communities made in good faith to meet competition." In the Senate, an amendment was adopted incorporating this provision. 80 Cong. Rec. 6426, 6435. In the House, the Judiciary Committee reported the bill with a provision substantially like that finally adopted, avoiding the vague phrase "to meet competition" and substituting the narrower criterion "to meet an equally low price of a competitor." 80 Cong. Rec. 8139. The House report on the bill stated in this regard: "This proviso represents a contraction of an exemption now contained in Section 2 of the Clayton Act which permits discriminations without limit where made in good faith to meet competition." H. Rep. 2287, 74th Cong., 2d Sess., p. 16.

The conference rejected the Senate version and approved the House provision. The conference report stated (H. Rep. 2951,

As the above quotation from the Commission's findings (*supra*, pp. 53-54) makes abundantly clear, there were two principal "circumstances" whose "existence" at the time of passage of the Robinson-Patman Act "imposed upon [Standard] the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute." These two "circumstances" were: (a) that Standard knew or should have known of the probability of competitive injury resulting from its pricing policy; and (b) that Standard knew or should have known that its price differential could not be cost-justified.[35] In dealing with these subsidiary factual findings as to "circumstances," the court below treated each as if it had no connection whatever with the conclusion it was plainly designed to support.

74th Cong., 2d Sess., pp. 6-7; 80 Cong. Rec. 9414): "This language [of the Senate bill] is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act. The Senate receded, and the language is stricken. A provision relating to the question of meeting competition * *, * is included in subsection (b) in the conference text as follows: [quoting the present provision]."

As a different panel of the Seventh Circuit, subsequent to the decision below, stated in a somewhat different context: "it must be remembered that in enacting the Robinson-Patman Act, 49 Stat. 1528 (1936), 15 U. S. C. A. § 13, Congress undertook to strengthen this phase of the Clayton Act which it thought had been too restrictive in practice by directing emphasis to individual competitive situations rather than competition in general." *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, 156, pending on petition for certiorari, No. 101, this Term.

[35] Standard's extraordinary assertion that these two subsidiary factual findings constitute "the first two grounds of the FTC ruling" (Br. Opp. 2) is wholly without substance, as even cursory examination of the Commission's findings will confirm.

As to the Commission's finding that Standard knew or should have known of the probability of competitive injury resulting from its pricing policy, the court below held that (R. 5499) "This is the same theory upon which the Commission's previous order was bottomed and which was expressly repudiated by the Supreme Court (pages 249–250)" in the 1951 *Standard* decision. However, nothing in that decision (340 U. S. 231) even remotely indicates that *knowledge* of probability of competitive injury cannot be legitimately considered on the "good faith" issue, particularly (as here) in determining whether a seller had an obligation to review its pricing policy on passage of the Robinson-Patman Act. Presumably the reference of the court below is to the quite different matter of the completeness of the Section 2 (b) defense in the face of competitive injury.

As to the Commission's finding that Standard knew or should have known that its price differential could not be cost-justified, the court below held that this finding was "irrelevant" because Standard had abandoned its defense of cost justification (R. 5499). Standard's *knowledge* of the lack of cost justification, however, is not "irrelevant" on the issue of "good faith." Here, for example, it was material in considering whether Standard evidenced "good faith" when it failed to make any bona fide effort to change its pricing policy after passage of the Robinson-Patman Act. Conversely, if Standard had reasonably believed the differential was cost-justified, its "good faith" claim might thereby have been strengthened.

It is not necessary to determine whether the Commission's rejection of Standard's Section 2 (b) defense may be placed *solely* on Standard's failure, in the face of the "circumstances" discussed above, to make a bona fide effort on passage of the Robinson-Patman Act to establish a non-discriminatory pricing policy. Instead of constituting a wholly independent ground, the Commission's findings in this regard constitute another aspect of what it characterized (R. 5388) as "the real question"—namely, "whether or not the actions of [Standard] in granting or continuing to these four dealers the tank-car price pursuant to and in accordance with its general policy can be said to have been made in good faith within the meaning of Section 2 (b)." For the reasons set forth in this and preceding sections of the brief, this question must, we believe, be answered in the negative, as the Commission held.

CONCLUSION.

It is respectfully submitted that the judgment below should be reversed and the case remanded to the Court of Appeals for consideration of the appropriateness of the terms of the Commission's order.

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APPENDIX

Paragraphs 16 and 17 of Standard's answer (R. 12–15) state:

> Respondent alleges that since the time each of the gasoline customers named in Paragraph Three of the Complaint acquired its own bulk storage, distribution equipment and wholesale facilities, that such customer is entitled to be classified as a wholesale or jobber buyer of gasoline as distinguished from a retail reseller or service station operator who purchases gasoline on an entirely different basis of taking frequent small deliveries by tank truck from a supplier who delivers into relatively small storage tanks in or upon the service station premises, which tanks are directly connected to the retail pumps. Further, that such wholesaler or jobber buyers perform a distinctly different service and function and operate upon a different basis from retail sellers, and that such differences and distinctions in services and functions and between methods of operation have been recognized for many decades last past and are presently recognized and have been so recognized since June 19, 1936, in Detroit and elsewhere throughout the entire United States by the entire oil industry as well as by other industries dealing in substantially all kinds of consumer goods, and that in consequence of such differences and distinctions in operations, functions and services, and the essential recognition thereof, the oil industry and other industries in Detroit and throughout the rest of the United States has and does classify and bona fidely select customers on the basis of functional services and of methods of opera-

tions entitling customers to be classified in distinctive and distinguishable classifications. Further, that such classifications are essential and necessary and appropriate to the existing and continuing business and commercial activity in consumer commodities, including oil products, in Detroit and throughout the United States, and that such system and practice of selection and classification of customers in the oil industry and other industries in Detroit and throughout the United States forms a necessary, indispensable and integral part of the commercial economy of this nation, and one which must be considered, recognized, met, and participated in by an operator engaged in the business of distribution and marketing of oil products if such business is to fairly and successfully survive in the market place in Detroit or elsewhere in the United States. Further, that as a result of such necessary selection and classification of customers, and as an integral and basically essential part thereof, and of the system of commercial economy which makes such classifications necessary, differences in prices of the same commodities are made to customers selected and falling within different classifications, and purchasers falling within the classification of wholesalers or jobbers of gasoline are entitled to purchase at tank car prices as distinguished from dealer tank wagon prices at which gasoline is sold to retail resellers.

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Respondent alleges that its general policy and practice of bona fidely selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers, is as follows:

That such wholesale or jobber customer so classified shall have adequate bulk storage of his own; that he be equipped to receive bulk

deliveries by tank car or truck train into such storage; that he have adequate distribution and delivery facilities; that he make tank car purchases in substantial volume and do a continuing substantial volume of business as a bona fide gasoline dealer maintaining and operating an established gasoline business; that he have satisfactory credit rating; that he maintain a sufficient personnel and all requisite facilities and equipment to adequately operate his business, service his customers, and perform his functions as a wholesaler or jobber, and assume the hazard and expense of fully operating his own business.

Respondent alleges that each of the four customers named in Paragraph Three of the Complaint fully, fairly, and reasonably falls within not only the requirements set forth in Paragraph 17 above but within all fair, reasonable, usual and proper requirements for classification as a wholesaler or jobber, and that each maintains its own adequate bulk storage, delivery tank trucks, salesmen and operating personnel; buys in substantial tank car or truck train lots; buys commodities other than gasoline in wholesale and carload lots; bears all expense of its own operations, no part of which are borne by Respondent; becomes immediately the absolute owner of the gasoline delivered into its storage by Respondent and controls its disposition; does not depend upon or desire that its customers be serviced by Respondent's salesmen, and Respondent's salesmen do not service or solicit such customers; assumes the risk of carrying its own inventories and of extending its own credits and making collections, and assumes all the hazards of its own operations. Further, that said four customers are each bona fidely qualified to be regarded and are regarded by the oil industry in Detroit as within the classification of wholesale or jobber customers, and they each are able to purchase as such from a

great number of gasoline suppliers operating in Detroit competitively with Respondent. Further, that Respondent is without power to, and is neither entitled nor required to police, control or dictate the manner or method of disposition of such gasoline as may be employed by such customers, and that such gasoline becomes the absolute property of such customers upon their purchase thereof from Respondent. Further, that said four customers and each of them are legitimately and lawfully entitled to purchase gasoline, and Respondent is entitled to sell them gasoline, within their classification as wholesalers or jobbers and at prices which are or may be at the time different and lower than prices charged by Respondent for the same product to Respondent's retail reseller customers without regard to any other consideration and without regard to any relation which such price differential may or may not bear to Respondent's differing operating costs arising from differing costs of manufacture, differing costs arising out of different methods of sale or delivery, or otherwise, and that any such acts upon Respondent's part and the existence of any such facts have not and do not constitute a violation of the meaning and terms of Section 2 (A) of the Clayton Act as amended and are not unlawful thereunder or under any law.

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